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No. 86-442

In the

Supreme Court of the United States

OCTOBER TERM, 1986

AIR LINE EMPLOYEES ASSOCIATION, INTERNATIONAL,

Petitioner,

v.

REPUBLIC AIRLINES, INC., NORTHWEST AIRLINES, INC., NWA, INC., BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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September 18, 1986

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QUESTIONS PRESENTED

1. Does a district court have jurisdiction to issue a *status quo* injunction to prevent the surviving carrier in an airline merger from unilaterally recognizing one of two competing unions as the representative of the employees of both carriers, pending National Mediation Board proceedings to determine the appropriate craft or class and the bargaining representative, where:

> — the carrier cannot determine which union will command a post-merger majority, and the proper craft or class unit is unclear, and
>
> — the carrier's unilateral action in so recognizing one union in a craft or class of its choosing violates Section 2 of the Railway Labor Act?

2. Does the exclusive authority of the National Mediation Board to determine representation issues preclude a district court from preliminarily enjoining violations of Section 2 of the Railway Labor Act, where:

> — the violations cannot be remedied by the National Mediation Board, and
>
> — the carrier's unilateral action in recognizing one of two competing unions inevitably must affect the outcome of the representation election, and
>
> — the *status quo* injunction does not interfere with but rather preserves the jurisdiction of the National Mediation Board?

3. If there is federal jurisdiction, does a carrier in an airline merger violate the Railway Labor Act by unilaterally recognizing one of the two competing unions as the representative of the employees of both carriers, pending National

Mediation Board proceedings to determine the appropriate craft or class and the bargaining representative, where:

— the carrier cannot determine which union will command a post-merger majority, and the proper craft or class is unclear?

LIST OF PARTIES

The parties to the proceedings below were petitioner Air Line Employees Association, International and respondents Republic Airlines, Inc., Northwest Airlines, Inc., NWA, Inc., Brotherhood of Railway and Airline Clerks, and International Association of Machinists and Aerospace Workers. The named respondents include all of the parties to the proceedings below, other than petitioner.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Air Line Employees Association, International ("ALEA") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on August 7 and 11, 1986, respectively.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported; it is reprinted in Appendix A hereto, p. A-1, *infra*. The memorandum decision of the United States District Court for the Northern District of Illinois, Eastern Division (Holderman, J.) is also unreported; it is reprinted in Appendix A hereto, p. A-6, *infra*.

JURISDICTION

Petitioner brought this action in the United States District Court for the Northern District of Illinois, invoking federal jurisdiction under 28 U.S.C. §§ 1331 and 1337(a). On July 25, 1986, the district court dismissed petitioner's complaint for lack of jurisdiction. *See* p. A-6, *infra.*

On August 7, 1986, the Seventh Circuit entered its order affirming the decision of the district court; subsequently, on August 11, 1986, it issued its opinion. *See* p. A-1, *infra.* Petitioner did not file a petition for rehearing.

The jurisdiction of this Court to review the judgment of the Seventh Circuit rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

In addition to the federal question and commerce jurisdiction statutes, 28 U.S.C. §§ 1331 and 1337(a), this action involves the application and interpretation of Section 2, First, Third, Fourth and Ninth of the Railway Labor Act, 45 U.S.C. § 152, First, Third, Fourth and Ninth, and Section 3, Second of that Act, 45 U.S.C. § 153, Second, as applicable to air carriers pursuant to 45 U.S.C. § 182. Each of these statutes is reprinted in Appendix B, p. B-1, *infra.*

STATEMENT OF THE CASE

The Acquisition of Republic Airlines, Inc. by NWA, Inc. and Its Impact on Employee Representation

The issues presented by this case arise at a time of unprecedented restructuring and realignment of the airline industry. Actual and anticipated mergers, acquisitions, attempted take-overs, and consolidations are continuously in the news.[1]

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[1] *See, e.g., Wall Street Journal*, Sept. 10, 1986, at 3, col. 1; *N.Y. Times*, August 28, 1986, § D at 1, col. 2; *Wall Street Journal*, May 21, 1986, at 6, col. 1; *Travel Weekly*, March 27, 1986 at 1, col. 3; *Business Week*, March 10, 1986, at 107.

The impact of these management decisions on airline employees and their unions is far-reaching.

Involved here is the acquisition of Republic Airlines, Inc. ("Republic") by NWA, Inc. ("NWA"), pursuant to an agreement and plan of merger dated January 23, 1986, a transaction which was consummated on August 13, 1986.[2] NWA is the parent of Northwest Airlines, Inc. ("Northwest") which, upon NWA's acquisition of Republic, began to merge the two airlines operationally, although Republic's separate legal existence will continue, at least for the time being.

For many years, petitioner ALEA has been the certified collective bargaining representative of Republic's office, clerical, fleet and passenger service employees, who number 6,624 (not including approximately 1,000 employees on furlough). Northwest employs 6,435 ground employees in classifications corresponding to those represented by ALEA at Republic, 4,505 of whom are represented by the Brotherhood of Railway and Airline Clerks ("BRAC") and 1,930 of whom are represented by the International Association of Machinists and Aerospace Workers ("IAM").[3] BRAC and

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[2] By its own terms and by virtue of Section 408 of the Federal Aviation Act, 49 U.S.C. § 1378, the NWA/Republic merger agreement was contingent upon approval by the United States Department of Transportation ("DOT"). The DOT approved the acquisition on July 31, 1986. *NWA-Republic Acquisition Case*, DOT Docket 43754, Order 86-7-81 (July 31, 1986). Under Section 801 of the Federal Aviation Act, 49 U.S.C. § 1461, any DOT action affecting the certificate of an international air carrier is subject to disapproval by the President. Accordingly, in order to permit the acquisition to proceed immediately, the DOT approved the transfer of Republic's domestic and international certificates in separate orders with only the order transferring the international certificate being subject to Presidential disapproval. *Id.* Thus, NWA and Republic completed the agreed merger on August 13, 1986.

[3] The figures stated are taken directly from data submitted in evidence by Northwest during the DOT proceeding. Based on these figures, petitioner believes that it will be the presumptive majority union in the combined employee group in its craft or class following the Republic/Northwest operational merger. In

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IAM filed unopposed motions for leave to intervene in the district court as additional parties defendant and opposed petitioner's request for injunctive relief in the Court of Appeals.

The transaction between NWA and Republic, like many recent airline mergers, involves many labor organizations and thousands of employees. For any given craft or class, more than one union is often involved, and the crafts or classes on the merging airlines may not coincide. In the present case, for example, the office, clerical, fleet and passenger service employees of Republic are represented by ALEA, while employees in comparable job classifications are

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the district court, Northwest took the position that, because "[t]he craft or class configurations at Republic and Northwest differ significantly," it is "impossible at this time to state with certainty exactly how many office, clerical, fleet and passenger service personnel at Republic will be added to the BRAC-represented group at Northwest and how many will be added to the IAM-represented group." Northwest accordingly defended its decision to continue to recognize BRAC and IAM (*see* pp. 5-7, 20-24, *infra*) *solely* on the grounds that, in the context of a merger of two carriers, it was legally bound to recognize the unions on the surviving entity. While thus disputing petitioner's claim to a presumptive majority, Northwest did not assert that it acted from a belief that BRAC and IAM were the majority unions. In the Court of Appeals, Northwest's position had evolved to the point of asserting that, in extending recognition to BRAC and IAM, it had "in good faith, determined from the best information available which unions would be in the majority and should be recognized." Not only is that claim supported by *no* record evidence, it in fact flatly contradicts Northwest's assertions that it relied solely on its legal conclusions concerning the effects of mergers.

It is unnecessary to resolve any dispute as to which of the contending unions can command a post-merger employee majority, since it is sufficient for purposes of the question presented in this petition that Northwest has extended recognition to unions which have not been certified in a relevant post-merger craft or class and which cannot otherwise demonstrate clear-cut majority status.

represented by BRAC or IAM in differently defined crafts or classes at Northwest. Thus, the issues raised by the present case are all but certain to arise in every merger in which different unions represent employees on the merging carriers with respect to particular crafts or classes.

The BRAC/Northwest Transition Agreement

On July 13, 1986—a month prior to consummation of the merger and over two weeks before Department of Transportation approval of the merger—Northwest, without the participation or consent of ALEA, entered into an agreement with BRAC (the "Transition Agreement") (App. 148-67),[4] pursuant to which Northwest agreed, among other things:

> (1) to recognize BRAC as the exclusive collective bargaining representative of the combined post-merger group of employees in the craft or class represented by BRAC at Northwest immediately prior to the merger, even though Northwest conceded in the district court that it is impossible to determine whether the former Northwest employees will constitute a majority of the combined group on the new, merged carrier;
>
> (2) to transfer to BRAC responsibility for administration of the existing collective bargaining agreement between petitioner and Republic, including the substitution of the grievance procedure from BRAC's collective bargaining agreement with Northwest for the grievance procedure in petitioner's collective bargaining agreement with Republic and the replacement of the System Board of Adjustment theretofore in operation under petitioner's agreement with a System Board established under the BRAC/Northwest agreement;
>
> (3) to supplant the union security/dues checkoff provisions of petitioner's agreement with Republic in favor

[4] For the convenience of the Court, references to the record below are cited to the appendix filed by petitioner in the Court of Appeals and are cited herein as "App. [page No.]." Copies of that appendix were filed with the Clerk of this Court in connection with petitioner's application for injunction pending certiorari.

of the corresponding provisions in the BRAC/Northwest bargaining agreement, thereby compelling all 6,624 of petitioner's members employed by Republic, upon pain of losing their jobs, to become and remain members of BRAC and effectively shifting $115,000 in monthly dues income from petitioner to BRAC;

(4) to accept an integrated seniority list produced through BRAC by a BRAC-appointed committee of Northwest and Republic employees; and

(5) to make various other changes in petitioner's collective bargaining agreement with Republic, to be effective from consummation of the merger until November 1, 1986, at which time that agreement, with only minor exceptions, is to be abrogated completely and the terms of the BRAC/Northwest bargaining agreement are to become effective for the entire employee group to be represented by BRAC on the merged carrier.

Northwest is currently attempting to negotiate a similar agreement with IAM (App. 145, 202).

The Complaint in the District Court

The principal focus of the complaint is the allegation that by agreeing to extend recognition to BRAC as the exclusive representative of the post-merger employee group, without objective evidence supporting a good faith belief that BRAC would represent a majority of employees in the relevant post-merger craft or class, with knowledge that BRAC's majority status was actively disputed by petitioner and prior to any post-merger certification by the NMB, Northwest violated Section 2, Third and Fourth of the Act, 45 U.S.C. § 152, Third and Fourth. Petitioner sought a declaratory judgment and an order enjoining implementation of the Transition Agreement and maintaining the *status quo* pending the outcome of the NMB proceedings.[5]

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[5] The complaint also alleges that the carrier respondents violated Section 2, First of the Act by negotiating with BRAC and IAM concerning future terms and conditions of employment of Republic employees at a time, prior to the merger, when petitioner was indubitably the certified representative of those

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The jurisdiction of the district court was invoked pursuant to 28 U.S.C. §§ 1331 and 1337(a).

Proceedings Before the National Mediation Board

Petitioner learned of Northwest's intention to bargain exclusively with BRAC and IAM on July 7, 1986, and on July 11, 1986, filed a grievance under the grievance arbitration provisions of its collective bargaining agreement with Republic (App. 358-60, 362). Petitioner learned of the Transition Agreement on July 15, 1986, and filed the present lawsuit on July 18, 1986 (App. 360).

Since the NMB would not entertain a petition for an election to determine the representative of the employees in the appropriate craft or class *before* DOT approval of the Republic-NWA merger, *see Republic Airlines, Inc./Hughes Air Corp.*, 7 NMB 432 (No. 219) (1980); *Republic Airlines, Inc./Hughes Air Corp.*, 8 NMB 49 (No. 15) (1980), petitioner filed its NMB petition on August 1, 1986, the day after DOT approval.[6]

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employees. Finally, the complaint requests an order compelling expedited arbitration of a grievance filed by petitioner under its collective bargaining agreement with Republic, challenging Republic's failure to structure its transaction with NWA in such a way as to bind Northwest to assume that agreement in its entirety and without changes.

[6] Under NMB policy, petitioner is automatically entitled to an election, based on its pre-merger check-off authorizations from more than half the employees who will make up the post-merger combined workforce in the affected crafts or classes. *See Republic Airlines, Inc. (North Central-Southern Merger)*, 7 NMB 21 (No. 11) (1979); 29 C.F.R. § 1206.2.

There are significant discrepancies in the craft or class configurations at Republic and Northwest which the NMB must resolve before it can conduct an election. This determination will require a hearing which, in all probability, will consume many months so that, notwithstanding the directive in Section 2, Ninth, 45 U.S.C. § 152, Ninth, that the NMB certify the representative within 30 days, no election will in fact occur for a considerable period of time. The 30-day provision is merely

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REASONS FOR GRANTING THE WRIT

I.

The Holding that Federal Courts Lack Jurisdiction to Maintain the *Status Quo* Pending National Mediation Board Proceedings Conflicts With Decisions of this Court, Lower Courts and the NMB, Renders Unenforceable Basic Rights Under the Railway Labor Act, and Raises an Important Public Issue Which Must be Resolved

A. The Court Below Decided an Important Question of Federal Law, Addressed by this Court in Other Contexts, Which Must be Settled in Order to Assure the Enforceability of Basic Rights Under the Railway Labor Act

The jurisdictional issue presented arises in a context in which principles established by this Court appear to clash. One line of cases, where review has been sought of NMB determinations of an employee representative, holds unequivocally that the NMB has unreviewable discretion to make such determinations.[7] A second line of cases holds—equally unequivocally—that federal courts are empowered to enforce a carrier's obligations, under Section 2, Third and Fourth of the RLA, 45 U.S.C. § 152, Third & Fourth, to refrain from interfering with, influencing or coercing its employees in the selection of their representative and to treat

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directive, not mandatory, *e.g., Air Florida, Inc. v. NMB*, 534 F. Supp. 1, 11 (S.D. Fla. 1982), *appeal dismissed*, 720 F.2d 686 (11th Cir. 1983), and, indeed, has already expired. Absent relief from this Court, during the entire interregnum between the consummation of the merger and the NMB's certification of the post-merger representative, BRAC and IAM will be acting as representatives of the entire post-merger employee group in whatever crafts or classes those unions and Northwest deem proper, without regard to the desire of the majority of the employees in either the craft or class so selected, or the ultimately determined craft or class.

[7] *General Committee of Adjustment v. Missouri-Kansas-Texas Railroad Co.*, 320 U.S. 323 (1943); *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943).

only with the representative designated by a majority of the employees.[8] This latter line includes a case holding that the federal courts, not the NMB, constitute the proper forum to adjudicate and remedy "unfair labor practices" under the RLA.[9] Finally, a third line of cases holds that federal courts may enforce the obligations of carriers and employee representatives to submit minor disputes for resolution in accordance with the procedure mandated by Section 3 of the RLA, and on a proper showing, may preserve the *status quo* during the pendency of those proceedings.[10]

The complaint in the present case seeks enforcement of the "unfair labor practice" provisions of Section 2, Third and Fourth, of the RLA, and the protection of the minor dispute-resolution machinery under the RLA in a factual context which also gives rise to a representation dispute. Under this Court's decisions in the second and third lines of cases, the federal courts clearly have subject matter jurisdiction, unless the presence of a representation dispute automatically destroys that jurisdiction. *Only* if the present case and others like it involve an area of exclusive NMB jurisdiction and *only* if the first line of cases controls—regardless of claims otherwise justiciable under the second and third lines of cases—would subject matter jurisdiction be lacking, as held by the Court of Appeals in the present case.

The problem presented in this case—and many similar cases with which the lower courts have been increasingly

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[8] *Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548 (1930); *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937). *Cf. Chicago & Northwestern Railway Co. v. United Transportation Union*, 402 U.S. 570 (1971).

[9] *Chicago & Northwestern Railway Co. v. United Transportation Union*, 402 U.S. 570 (1971).

[10] *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30 (1957); *Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad Co.*, 373 U.S. 33 (1963); *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad Co.*, 363 U.S. 528 (1960).

confronted since deregulation of the airline industry—is to determine what role, if any, the Railway Labor Act contemplates for the federal courts where, in connection with a representation dispute, a carrier commits violations of the substantive "unfair labor practice" provisions of the Act or contractual violations which otherwise would be subject to judicial remedy under the Act.

The NMB has stated emphatically that it has no power to control a carrier's conduct and that persons injured by violations of the statute must look to the courts for relief. *Republic Airlines, Inc./Hughes Air Corp.*, 8 NMB 13, (No. 3) (1980).[11] In an appropriate case the NMB can set aside an election on grounds of carrier interference, and can revise its own procedures to protect the integrity of the electoral process. But it cannot order a carrier to bargain with a union defeated by the carrier's unlawful conduct, much less afford relief to the victims of that conduct. *See, e.g., Laker Airways, Ltd.*, 8 NMB 236 (No. 79) (1981) (a case which the Board characterized as evincing carrier misconduct amounting to "the most egregious violations of employee rights in memory," but where the "extraordinary remedies" adopted by the Board were limited to setting aside the tainted election and revising the procedures to be utilized in the re-run election). Thus the NMB has declined requests for *status quo* orders in conjunction with its proceedings, saying that such requests should properly be addressed to the federal courts. *Republic Airlines, Inc./Hughes Air Corp., supra*, 8 NMB at 18; *Pan American World Airways, Inc.*, 7 NMB No. 110 (1980); *see also Air Florida, Inc.*, 9 NMB 100 (No. 32) (1981).[12]

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[11] As Northwest conceded in the district court, citing *Air Florida, Inc.*, 8 NMB 546 (No. 167) (1981); and *Western Airlines, Inc.*, 7 NMB 337, 338 n. 1 (No. 176) (1980), carriers themselves are not even *parties* to the representation proceedings before the NMB.

[12] In *Sea Airmotive, Inc. d/b/a Seair Alaska Airlines*, 11 NMB 87 (No. 33) (1983), the NMB—without intimating any view that its exclusive province had been invaded—relied on the issuance

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There is no doubt that, in the present case, if the NMB were to determine that Northwest is guilty of unlawful interference and coercion, or unlawful assistance to BRAC and IAM, it could take steps—such as modifying the ballot or its election procedures—to try to insure the fairness of the employee referendum. It could set aside the election or even refuse to certify BRAC or IAM if it found that the unlawful conduct had destroyed the possibility of a fair election. But it could not certify ALEA or order Northwest to bargain with ALEA if ALEA loses the election, even if that loss were the direct result of respondents' illegal conduct. The ultimate NMB sanction, if the "laboratory conditions" for a fair election are destroyed by the carrier's violations of the law, is to refuse to certify any union. Thus, as succinctly put by Judge Waters in *Air Line Pilots Ass'n, Int'l v. Scheduled Skyways, Inc.*, 567 F. Supp. 171, 181 (W.D. Ark. 1983), *aff'd in part on other grds,* 738 F.2d 339 (8th Cir.), *appeal dismissed as moot,* 746 F.2d 456 (8th Cir. 1984), "the employer wins." The carrier is actually rewarded for its illegal conduct.

More importantly, the NMB can do nothing to remedy the fact that, from the date of the merger to the conclusion of the NMB proceeding, the employees of the merged carrier will have thrust upon them a representative not of their own choosing, as guaranteed by the statute, but selected by their employer in the face of a flat statutory prohibition against carriers so much as *influencing* the choice of a representative. And the NMB can do nothing whatsoever to remedy the fact

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of a *status quo* injunction against the carrier by the District Court for the District of Alaska, in fixing the eligibility date for an election. Thereafter, the Board relied on the court's findings in the ensuing contempt proceeding as grounds for setting aside the election (which the union lost) and in adopting several other measures designed to favor the union if it was able to request a second election. *Sea Airmotive, Inc. d/b/a Seair Alaska Airlines,* 11 NMB 207 (No. 77) (1984). The court's decisions are unreported.

that, by virtue of the action of the carriers, the former Republic employees will be compelled to pay dues to unions which have never established their majority status, and which those employees have never had an opportunity to accept or reject. Nor can the NMB, even if ALEA wins the election, compel Northwest to abrogate the Transition Agreement or any other agreement it negotiates with its favored unions prior to the conclusion of the NMB proceeding. Nor can the NMB restore to petitioner the dues income wrongfully diverted from petitioner to BRAC. In short, the NMB is powerless to remedy the substantive effects of the alleged illegal actions. *See Chicago & Northwestern Railway Co. v. United Transportation Union*, 402 U.S. 507 (1971); *cf. Detroit & Toledo Shore Line Railroad v. United Transportation Union*, 396 U.S. 142, 158-59 (1969).

As this Court cautioned in *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 300 (1943), "If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control." Nonetheless, the precise effect of the decision below, and similar decisions declining jurisdiction where otherwise justiciable claims co-exist with representational issues, is to obliterate employee rights which Congress sought to protect in Section 2, Third and Fourth of the Act. It is naive to suppose that the NMB can properly perform its own functions if employers are free to engage in lawless conduct which effectively may determine the outcome of representation elections.[13]

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[13] Where a union ultimately loses a re-run election notwithstanding the indirect protections which the NMB can devise to try to neutralize employer violations of the law, it is impossible to say with assurance that the union's loss reflects the free choice of the employees. In such situations, which arise with some frequency, there is nothing the NMB can do but relax its requirements in future elections. *See Sea Airmotive, Inc. d/b/a*

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The issue thus lies at the heart of the administration of the Act. Protection of the employees' right to select their representatives free from carrier influence, coercion and unlawful assistance is the Act's cornerstone. *See Texas & New Orleans Railroad Co. v. Brhd of Railway & Steamship Clerks*, 281 U.S. 548, 569 (1930). Here, that protection has been abandoned. The importance of the issue is demonstrated by the repeated litigation spawned in the lower courts and the confused and conflicting responses which they have given.[14] With deregulation of the industry and the increasing num-

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Seair Alaska Airlines, 11 NMB 207, 209-10 (No. 77) (1984); *The National Mediation Board at 50—Its Impact on Railroad & Airline Labor Disputes* (NMB 1984) at 22-24. Under the decisions below, there is *no* tribunal with authority comparable to that of the National Labor Relations Board under the National Labor Relations Act to determine unfair labor practices arising in the context of a representation dispute, preserve the integrity of the election process by restraining such practices, assess their impact on the ultimate outcome, or order that the carrier bargain with a losing union were the loss is found to be attributable to employer misconduct.

[14] *See* pp.16-19, *infra*. The extent of the conflict is dramatically underscored by comparison of the decision below in this case with that in *Pan American World Airways, Inc. v. Int'l Brhd of Teamsters*, 275 F. Supp. 986 (S.D.N.Y. 1967), which was affirmed by the Second Circuit. 404 F.2d 938 (2d Cir. 1969). In the *Pan American* case, BRAC, the certified union, demanded that Pan Am meet with it to negotiate a new bargaining agreement at a time when BRAC and a rival union were involved in an NMB proceeding to determine which union represented the affected employees. When Pan Am refused, BRAC threatened to strike and Pan Am sued for a declaration that it would be illegal for it to negotiate a new agreement with BRAC until after the conclusion of the NMB proceeding. The court held that it had jurisdiction over Pan Am's suit, noting that it was not being asked to determine the identity of the representative and that, by enjoining resort to self-help, the court was actually aiding the NMB.

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ber of airline mergers and acquisitions,[15] the question here presented is certain to recur with increasing frequency.

B. To the Extent this Court Has Considered the Jurisdictional Question, its Decisions Conflict with the Decision of the Court Below

The mechanistic approach to jurisdiction espoused by the court below cannot be squared with this Court's teachings in *Texas & New Orleans Railroad Co. v. Brhd of Railway & Steamship Clerks*, 281 U.S. 548, 569 (1930); *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937); and *Chicago & Northwestern Railway Co. v. United Transportation Union*, 402 U.S. 570, 580-81 (1971). Under the rule adopted below, analysis ends with the discovery of a representation dispute; where the facts disclose such a dispute, the federal courts lose jurisdiction even over otherwise justiciable claims arising on those same facts. This approach utterly fails to take into account "the necessity for judicial enforcement if the right of the aggrieved party is not to prove illusory," *Chicago & Northwestern Railway v. UTU*, *supra*, 402 U.S. at 579, and substitutes a rigid formula for the case-by-case approach directed by *Chicago & Northwestern Railway*. *Id.* at 577.

Under those decisions, and under the better-reasoned lower court decisions typified by *Pan American World Airways, Inc. v. Int'l Brhd of Teamsters*, 275 F. Supp. 986 (S.D.N.Y. 1967), *aff'd*, 404 F.2d 938 (2d Cir. 1969), and *Air Line Pilots Ass'n, Int'l v. Scheduled Skyways, Inc.*, 567 F. Supp. 171 (W.D. Ark.

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Here, Northwest has done precisely what the *Pan Am* court held was illegal: it has negotiated an agreement with BRAC at a time when an active representation dispute is occurring, and when, by its own admission, it is impossible to tell whether BRAC represents a majority—or even what the relevant post-merger craft or class will be.

[15] *See, e.g., N.Y. Times*, September 11, 1986, at 36, col. 3; *Wall Street Journal*, May 21, 1986, at 6 col. 1; *Travel Weekly*, March 27, 1986, at 1, col. 3; *Business Week*, March 10, 1986, at 107.

1983), *aff'd in part on other grds*, 738 F.2d 339 (8th Cir.), *appeal dismissed as moot*, 746 F.2d 456 (8th Cir. 1984), the proper inquiry is whether the relief sought will interfere with or usurp functions exclusively committed to the NMB. Of course, the courts must be alert to efforts, by artful pleading or otherwise, to lure them unwittingly into substituting their own judgment for that of the NMB with respect to determining the identity of the employee representative. At the same time, however, the federal courts have the responsibility to assure compliance with the essential mandates of the Act.

The issue here is *not* which union is the true representative of certain ground employees on the merged carrier. The fact is that no one knows, or can know, the identity of the representative until the NMB has determined the proper crafts or classes, conducted an election, and certified the results. The issue, rather, concerns the nature and extent of the carriers' duties and responsibilities under Section 2, Third and Fourth of the Act.

Petitioner has submitted the question of the proper representative to the NMB procedure and seeks judicial relief *only* to insure the neutrality of Northwest during that process. Judicial enforcement of carrier neutrality is clearly consistent with the purposes and objectives of Section 2, Third and Fourth of the Act, and the granting of such relief in no way would invade the province of the NMB.

It is true that, until the NMB can determine and certify the representative or representatives, a *status quo* injunction would mean that ALEA, BRAC, and IAM will continue to represent the employee groups which selected them to be their representatives in the past, and it is presumably this effect which the Fifth Circuit had in mind in stating that relief inherently involves a representation determination. *International Brhd of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d 157 (5th Cir. 1983). But, absent maintenance of the *status quo*, the selection of the representative for the interim period effectively and irrevocably *will be made by the employer.*

There may be something to be said for permitting voluntary recognition by a carrier in the face of a representation dispute where there is clear-cut evidence that the union being recognized represents the majority of the affected employees.[16] But it is clearly more consistent with the statutory purpose to permit judicial intervention to compel employer neutrality by enforced continuation of the employees' historic representatives for the interval until the employees have an opportunity to make a new choice than to allow an employer to dictate the choice of representatives where, as here, it is impossible to tell which of the contending unions will ultimately establish itself as the choice of the majority. If the employer is permitted, in effect, to choose the representative and the employees later ratify the employer's favorite at the polls, it will never be known whether that representative's ultimate victory is or is not the result of the employer's granting the favored union "a deceptive cloak of authority with which to persuasively elicit additional employee support." *International Ladies' Garment Workers Union v. National Labor Relations Board*, 366 U.S. 731, 736 (1961).

Thus, limited judicial intervention is essential to protect the rights of the employees under Section 2, Third and Fourth of the Act, and will not intrude upon the exclusive province of the NMB. The previous decisions of this Court are consistent with these principles; the decision below seriously undercuts those same principles.

C. There is a Conflict Among the Lower Courts, Which this Court Should Resolve

Two conflicting responses emerge from decisions of the lower courts which have wrestled with this issue. One line

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[16] *But cf. Pan American v. IBT, supra*, 275 F. Supp. at 997, discussed *supra*, note 14, holding that, in the face of a genuine question concerning representation, the employer's obligation of strict neutrality precludes it from negotiating with *any* of the contending unions, including the certified union.

of cases—including the decision below—takes the position that, where the facts disclose that a representation dispute is involved, the courts are automatically ousted from jurisdiction.[17] Under those decisions, it is immaterial that the NMB's powers are inherently limited to measures designed to protect the integrity of the process by which the employee representative is selected and do not extend to fashioning or enforcing substantive remedies for other consequences of unlawful conduct. Nor is there room, in the view of these courts, for analysis as to whether the relief requested would impinge on the functions assigned by the Act exclusively to the NMB. Under the most extreme of these decisions, the courts are without power even to grant interim relief in aid of the NMB's jurisdiction and to preserve the *status quo* by preventing statutory violations during the pendency of an NMB proceeding.

Thus, implicit in these decisions and the decision below is the assumption that, the instant a representation dispute looms on the horizon, the federal courts must cede the entire field to the NMB, even though the same set of facts gives rise to issues otherwise justiciable under *Virginian Railway, Chicago & Northwestern* and *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad*—claims which are beyond the power of the NMB to remedy. Closely aligned, though less sweeping in their import, are decisions refusing requests for judicial intervention where, in a court's view, the request would require the court effectively to determine the identity of the employee representative, even though the complaint

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[17] *See International Brhd of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d 157, 161 (5th Cir, 1983); *Air Line Pilots Association, International v. Texas International Airlines, Inc.*, 656 F.2d 16, 23 (2d Cir. 1981). *Division No. 14, Order of Railroad Telegraphers v. Leighty*, 298 F.2d 17 (4th Cir.), *cert. denied*, 369 U.S. 885 (1962), cited by the Fifth Circuit in *Teamsters v. Texas International, supra*, for the proposition that the courts may not grant interim *status quo* injunctive relief, merely holds that *the particular relief there sought* would have altered, rather than preserved, the *status quo* and would therefore not have been a neutral judicial act.

on its face purports to raise statutory or contractual, rather than representational, issues.[18]

At the opposite end of the spectrum are numerous cases holding flatly that the courts are empowered to restrain violations of the substantive provisions of the Act and to grant injunctions preserving the *status quo*, notwithstanding the presence of representational issues.[19] Also supportive of

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[18] *E.g., Brotherhood of Railway & Steamship Clerks v. United Air Lines, Inc.*, 325 F.2d 576 (6th Cir. 1963), *cert. dismissed as improvidently granted*, 379 U.S. 26 (1964); *Ruby v. American Airlines, Inc.*, 323 F.2d 248 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964); *Division No. 14, Order of Railroad Telegraphers v. Leighty*, 298 F.2d 17 (4th Cir.), *cert. denied*, 369 U.S. 885 (1962). In some cases in which judicial intervention has been refused, courts have intimated that there may be circumstances in which such intervention would be proper. *International Association of Machinists v. Northeast Airlines, Inc.*, 536 F.2d 975 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976); *Texidor v. Ceresa*, 590 F.2d 357 (1st Cir. 1978); *Aircraft Mechanics Fraternal Association v. United Airlines, Inc.*, 406 F. Supp. 492 (N.D. Cal. 1976).

[19] *E.g., Summit Airlines, Inc. v. Teamsters Local Union No. 295*, 628 F.2d 787 (2d Cir. 1980) (recognitional picketing enjoined); *Adams v. Federal Express Corporation*, 547 F.2d 319 (6th Cir. 1976), *cert. denied*, 431 U.S. 915 (1977) (jurisdiction to enjoin unlawful carrier interference during union organizing campaigns); *Air Line Pilots Association, International v. Texas International Airlines, Inc.*, 567 F. Supp. 66, 77 (S.D. Tex. 1983) (order compelling arbitration of grievance proper notwithstanding pending NMB proceeding); *Air Line Pilots Association, International v. Scheduled Skyways, Inc.*, 567 F. Supp. 171, 181 (W.D. Ark. 1983), *aff'd in part on other grds*, 738 F.2d 339 (8th Cir.), *appeal dismissed as moot*, 746 F.2d 456 (8th Cir. 1984) ("If the court accepts [the argument that it is without jurisdiction to enjoin carrier interference and coercion], as long as the employer acts swiftly and acts decisively and interferes to the extent that the unionization effort fails, it may act with impunity .... That simply cannot be the law, and, in the court's view it is not the law"); *Union of Professional Airmen v. Alaska Aeronautical Industries, Inc.*, 95 LRRM 2868 (D. Alaska 1977)

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the conclusion that the federal courts may remedy and prevent violations of the law occuring during the course of a representation dispute are the cases sustaining employee causes of action for wrongful discharge in connection with union organizational efforts.[20]

Thus, there is a sharp conflict among the lower courts with respect to the jurisdictional issues raised in this case which this Court should resolve.

II.
To the Extent the Seventh Circuit Reached the Merits, its Decision is Contrary to the Railway Labor Act, NMB Precedent, and the Construction of Analogous Provisions of the National Labor Relations Act

Because the court below erroneously affirmed the dismissal for lack of jurisdiction, it did not decide the merits of ALEA's underlying claim. To the extent the Seventh Circuit did discuss the merits, however, its approach is contrary

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(enjoining carrier interference and coercion during and after conclusion of NMB proceeding); *Associated Pilots of Alaska International Air, Inc. v. Alaska International Air, Inc.*, 83 CCH Labor Cases ¶ 10,531 (D. Alaska 1976) (enjoining carrier interference during union organizational campaign and rejecting carrier's contention that dispute was within the exclusive jurisdiction of the NMB); *Pan American World Airways, Inc. v. International Brotherhood of Teamsters*, 275 F. Supp. 986, 994 (S.D.N.Y. 1967), *aff'd sub nom. Brotherhood of Railway, Airline and Steamship Clerks v. Pan American World Airways, Inc.*, 404 F.2d 938 (2d Cir. 1969) (judicial intervention permissible where such intervention does not "constitute interference with or usurpation of functions exclusively committed to the [NMB] under § 2, Ninth of the Act").

[20] *E.g., Adams v. Federal Express Corp., supra*; *Burke v. Compania Mexicana de Aviacion*, 433 F.2d 1031 (9th Cir. 1970); *International Association of Machinists v. Altair Airlines, Inc.*, 481 F. Supp. 1359 (E.D. Pa. 1979); *Kent v. Fugere*, 438 F. Supp. 560 (D. Conn. 1977).

to the Railway Labor Act, NMB precedent, and well-established authority interpreting the analogous provisions of the National Labor Relations Act.

Reduced to its essentials, ALEA's claim is that Northwest violated Section 2, Third and Fourth, of the Railway Labor Act by negotiating with BRAC and IAM, and by entering into a labor contract with BRAC which purports to be generally applicable to the employees in the post-merger craft or class, at a time when BRAC and IAM were not certified in the overall employee group and could not clearly demonstrate their majority status, and when their representative status was actively disputed. Such conduct falls squarely within the statutory proscriptions. *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 548-49 (1937); *Pan American World Airways, Inc. v. Int'l Brhd of Teamsters*, 275 F. Supp. 986 (S.D.N.Y. 1967), *aff'd*, 404 F.2d 938 (2d Cir. 1969).

The principal argument advanced below in defense of Northwest's recognition of BRAC and IAM is that Northwest was required by law to recognize those unions. Northwest asserted that, under NMB decisions in merger cases, the certifications of all unions on the "acquired" carrier are automatically "extinguished by operation of law" (App. 194-95), so that only the certifications on the "acquiring" carrier—in this case, Northwest—survive. Respondents based this conclusion on their interpretation of the results in seven merger cases (App. 194-201).[21]

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[21] (a) *United-Capital Merger (1961) (citing Brotherhood of Railway and Steamship Clerks v. United Airlines, Inc.*, 325 F.2d 576 (6th Cir. 1963), *cert. dismissed as improvidently granted*, 379 U.S. 26 (1964), and *United-Capital Merger Case*, 33 CAB 307 (1961)); (b) *Allegheny-Lake Central Merger (1968) (citing* 48 CAB 664 (1968), *aff'd, Air Line Employees Association v. CAB*, 413 F.2d 1092 (D.C. Cir. 1969)); (c) *Delta-Northeast Merger (1971) (citing International Association of Machinists v. Northeast Airlines, Inc.*, 473 F.2d 549 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972), and 536 F.2d 975 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976), and *Delta-Northeast Merger*, CAB Order 73-9-42 (1973)); (d) *North Central-Southern Merger*

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Even if respondents were correct[22] and the survival of the union certification were, in fact, simply a function of which of the carriers involved in the merger is the surviving entity, Northwest would still be legally obligated to refrain from dealing with BRAC and IAM with respect to the combined employee group. While on this assumption BRAC and IAM might, in some sense, be the "certified" unions, the teaching of *Pan Am v. IBT, supra*—the only case which appears to have squarely considered the question—is that the carrier must not negotiate new agreements even with the *certified* union during the pendency of a genuine representation dispute. Thus, the argument that the identity of the surviving carrier automatically determines the identity of the employee representative, even if correct, is irrelevant, since the carrier's obligations in these circumstances are not dependent upon the certifications.

In any event, acceptance of respondents' argument has the anomalous result that, under a statute expressly intended to protect the right of employees to select their own representative and to require that employers treat only with the

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(1979) (citing Republic Airlines, Inc., 6 NMB 817 (No. 1231) (1979) and 7 NMB 21 (No. 11) (1979)); (e) *Pan Am-National Merger (1979) (citing Pan American USA, Inc.*, 7 NMB 168 (No. 90) (1979)); (f) *Republic-Air West Operational Merger (1980) (citing Republic Airlines, Inc./Hughes Air Corp.*, 8 NMB 49 (No. 15) (1980)); (g) *Texas International-Continental Operational Merger (1982) (citing International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157 (5th Cir. 1983)).

[22] That respondents' reading of NMB precedent is in error is amply demonstrated by *Continental Airlines*, 10 NMB 24 (No. 9) (1982), in which the NMB held that it is lawful for a merged air carrier to continue to recognize both pre-merger unions in a single post-merger craft or class, pending the NMB's certification of a single post-merger representive for the merged craft or class. Respondents were thus flatly incorrect in asserting that NMB precedent left Northwest no choice but unilaterally to recognize BRAC and IAM.

employee representative designated by the majority, the identity of the representative following a merger would nevertheless be determined by the legal form in which the employers choose to structure their transaction—a choice dictated by the employers' own purposes and having nothing whatsoever to do with the wishes of a majority of the employees. Worse yet, such a rule would create an opportunity for an unscrupulous employer to take advantage of its ability effectively to determine the identity of the interim representative to gain negotiating advantages. Thus, where a parent acquires a second airline subsidiary with the intention of merging its two carrier subsidiaries operationally, it could condition its selection of the surviving entity on the incentives the competing unions offered to persuade the parent to make one carrier the "acquiring" carrier.

The cases relied on by Northwest really stand for nothing more than the undoubted proposition that, in a merger situation, where one union has a clear majority of the combined post-merger employee group, the carrier is entitled voluntarily to recognize that union. In every case relied on by Northwest, there was solid evidence, at the time the union in question was voluntarily recognized by the carrier, that that union would enjoy the support of well over 50% of the post-merger group.[23] In all but two of the cases, the displaced

[23] In the *United-Capital* case, the opinion of the Sixth Circuit in *Brotherhood of Railway and Steamship Clerks v. United Air Lines, Inc.*, *supra*, makes clear that, prior to the merger, BRAC represented approximately 2,700 Capital employees compared to approximately 10,000 United employees in the comparable classifications. 325 F.2d at 578. Thus, BRAC did not have enough members to get an election under NMB rules and though it filed an application with the NMB seeking certification of the post-merger craft or class, 325 F.2d at 579, that application was voluntarily withdrawn by BRAC during the investigation stage of the NMB proceeding (App. 337).

Similarly, in *Allegheny-Lake Central*, none of the former Lake Central unions (of which petitioner was one) had enough members to entitle it to a representation election on the merged

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unions could not even muster the requisite 35% showing of

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property, even under the relaxed showing of interest required by the NMB in merger cases (App. 337). For example, as reflected in the decision in *Air Line Employees Association v. CAB*, 413 F.2d 1092 (D.C. Cir. 1969), prior to the merger, petitioner represented approximately 400 Lake Central passenger service employees, as compared to approximately 1,100 to 1,200 unrepresented Allegheny employees. 413 F.2d at 1093. Thus, petitioner could only claim about one-fourth of the post-merger craft or class (*id.*), not enough to obtain an election.

In the *Delta-Northeast* case, neither of the former Northeast unions had enough members to command an election (App. 197-98, 337). While comparative numbers are not available, the district court's decision in *International Association of Machinists v. Northeast Airlines, Inc.*, 337 F. Supp. 499 (D. Mass.), *aff'd*, 473 F.2d 549 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972), states that, prior to the merger, the IAM represented about 1,000 Northeast employees and that the total number of Delta's employees was nearly 21,000, all of whom were unrepresented except the pilots (*id.* at 500), thus indicating that the Delta group was by far the larger of the two.

The *North Central-Southern* merger was another case in which petitioner was a direct participant. In that case, the displaced union was able—just barely—to meet the NMB's showing of interest requirement and so secured an election (App. 337). But at the time the carrier announced its intention to recognize IAM as representative of the merged employee group, IAM had approximately 850 members employed by North Central, compared to approximately 450 members of the displaced union at Southern (App. 337). Thus, the pre-merger employee figures indicated that IAM enjoyed slightly under a 2-to-1 margin (*Id.*).

In the *Pan Am-National* merger, petitioner did not have a sufficient number of members to obtain an election (*Id.*).

In the *Republic-Air West* merger, the displaced union did not initially have 35% of the combined employee group on the basis of the pre-merger dues check-offs, so that when, prior to the merger, Republic announced its intention to voluntarily recognize IAM as representative of the post-merger combined group,

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interest to secure an NMB election.[24] It is therefore clear that *it is the question of majority status, not the form of transaction*, which governs. Such a rule is totally consistent with the policies of the Act.

Here, however, the identity of the majority union cannot be ascertained until the NMB has made its determination. Thus, Northwest's legal obligation is to remain scrupulously neutral during the selection process. Instead, Northwest has openly favored BRAC and IAM.

Indeed, to the extent the Seventh Circuit considered the question (*see* Slip Opinion at 4 n.4, p. A-4, *infra*), the court suggested that unless the majority status of one union is clear, a carrier may recognize and bargain with whichever union it chooses. That approach is flatly contrary to the Railway Labor Act's requirement that carriers may bargain only with majority unions, and is at odds with the NMB precedent discussed above.

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it had in hand evidence satisfactory to the NMB that IAM represented in excess of 65% of the employees (App. 337). Subsequently, the displaced union was able to secure enough additional authorization cards to obtain an election.

[24] Coincidentally, in all but one of the cases relied on by Northwest, the presumptive majority union was, in fact, the union of the "acquiring" carrier. But in the *Texas International-Continental* merger, notwithstanding the fact that Texas International was the "acquiring" carrier, it was Texas International's union which was displaced. The reason is perfectly plain: the Teamsters Union represented only 1,800 Texas International employees prior to the merger, whereas Continental employed some 4,000 employees in the same craft or class, all of whom were unrepresented (*IBT v. Texas International, supra*, 717 F.2d at 159-60), giving the Teamsters only about 30% of the post-merger total. *Id.* at 160. Thus, in the one instance in which the majority union did not happen to be the union on the "acquiring" carrier's property, it was the certification of the "acquiring" carrier's union which was "extinguished."

The Seventh Circuit's approach is also contrary to the well-established analogous rule under the National Labor Relations Act that an employer may not recognize a minority union, even if it has a good faith belief that it is a majority union. *See, e.g., International Ladies' Garment Workers Union v. NLRB*, 366 U.S. 731 (1961).[25]

In sum, to the extent the court below reached the merits, its approach is contrary to the RLA, NMB precedent, and analogous authority under the NLRA. Particularly in view of the increasing frequency of mergers in the airline and railroad industries, the issue merits review by this Court.

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[25] It is well established that courts look to the NLRA in construing the RLA, unless there is a textual basis for divergent constructions. *See, e.g., Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A
(Opinions and Judgments Below)

In the

United States Court of Appeals

For the Seventh Circuit

No. 86-2233

AIR LINE EMPLOYEES ASSOCIATION, INTERNATIONAL,

Plaintiff-Appellant,

v.

REPUBLIC AIRLINES, INC., NORTHWEST AIRLINES, INC. and NWA, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 5239—**James F. Holderman**, *Judge.*

SUBMITTED JULY 29, 1986—DECIDED AUGUST 7, 1986*—
OPINION AUGUST 19, 1986

Before CUMMINGS, *Chief Judge*, EASTERBROOK and RIPPLE, *Circuit Judges.*

PER CURIAM. The Air Line Employees Association, International (ALEA), the certified collective bargaining representative for 6624 ground employees of defendant Republic Airlines (Republic), appeals an order of the district court dismissing its complaint for lack of subject

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* We originally decided this case by unpublished order.

matter jurisdiction. We affirm the judgment of the district court.[1]

The merger of Republic with Northwest Airlines (Northwest) has just been approved by the Department of Transportation. It is anticipated that, unless the President disapproves those aspects of the proposed acquisition having implications for international travel,[2] the merger will soon take effect and a single airline, Northwest, will survive. In anticipation of this merger, Northwest entered into a transition agreement with two unions which currently represent its 6435 ground employees, the Brotherhood of Railway and Airline Clerks (BRAC) and the International Association of Machinists (IAM). Under the terms of that agreement, these unions would represent the newly-combined workforce of the post-merger entity.

In anticipation of the merger, ALEA brought this action in the district court seeking an injunction against the implementation of the Transition Agreement. In Count 1 of its complaint, ALEA claims that the defendants have violated their obligations under section 2, First of the Railway Labor Act (RLA), 45 U.S.C. § 152, First, to bargain solely with ALEA as the representative of the majority of the employees in the class or craft involved. In Count 2, ALEA contends that the defendants' conduct also violates their duties under section 2, Third and Fourth of the RLA, 45 U.S.C. § 152, Third and Fourth, by interfering, influencing or coercing their employees in the employees' choice of a bargaining representative and by favoring one union against another. ALEA also seeks,

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[1] The Air Line Employees Association, International (ALEA) has filed a motion to expedite the appeal. That motion is granted. It has also filed a motion for injunction pending appeal. We deny that motion as moot.

[2] *See* 49 U.S.C. § 1461. The Department of Transportation (DOT) has submitted the proposed merger to the President. The President has sixty days in which to notify DOT of his opposition, if any, to the merger. However, the President may notify DOT at any time during the sixty days of his intent not to oppose.

under these two counts, an injunction preserving the *status quo* pending resolution of the representation issue through an election conducted under the auspices of the National Mediation Board (NMB). In Count 3, ALEA alleges that the defendants' conduct is in violation of the ALEA-Republic bargaining agreement. Under this count, the plaintiff seeks an order compelling expedited arbitration of its grievance challenging defendants' contract violations and preserving the *status quo* pending issuance of the arbitrator's decision.

The district judge dismissed the action without a hearing. He concluded that the complaint was basically "a representational dispute over which the federal courts do not have jurisdiction." Order, No. 86 C 5239 (N.D. Ill. July 28, 1986).

We agree with the district judge. While this circuit has not had, before today, an opportunity to rule on the point, the district judge's decision was in conformity with—as he put it—"the overwhelming and well-developed case law addressing issues similar to those presented in the instant complaint." *Id.* Like the district judge, we find extended discussion neither necessary nor appropriate. After examining the precedent upon which he relied,[3] we find no reason to depart from the consistent and well-considered analysis of our colleagues in other circuits. Judge Rubin's opinion for the Fifth Circuit in *International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157 (5th Cir. 1983), is especially helpful. There, in a factual setting very similar to our own, the court held that, even though the complaint was couched in terms of enforcing the collective bargaining agreement, the dispute

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[3] *See International Bhd. of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d 157 (5th Cir. 1983); *Air Line Pilots Ass'n, Int'l v. Texas Int'l Airlines, Inc.*, 656 F.2d 16 (2d Cir. 1981); *International Ass'n of Machinists v. Northeast Airlines, Inc.*, 536 F.2d 975 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976); *Brotherhood of Ry. & S.S. Clerks v. United Air Lines, Inc.*, 325 F.2d 576 (6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964).

was basically a representational dispute and therefore committed to the sole jurisdiction of the NMB:

> The Act commits disputes involving a determination of who is to represent airline employees in collective bargaining to the exclusive jurisdiction of the National Mediation Board. A court may not entertain an action involving such a dispute even if it arises in the context of otherwise justiciable claims.
>
> * * *
>
> Continuation of the contract in force unavoidably constitutes a determination of employee representation, and the conjunction of the two issues creates a conflict in principles, one dictated by the express statutory provision giving the Board sole jurisdiction over representation matters and the other implicit from the limited scope of the statute, that other disputes are reserved for judicial resolution.

717 F.2d at 161 (citations omitted).[4]

In short, like the Fifth Circuit, "[g]iven the Mediation Board's undeniable sole jurisdiction over representation matters, we infer from the practical problems of divided jurisdiction a congressional intention to allow that agency alone to consider the post-merger problems that arise from existing collective bargaining agreements." *Id.* at 164. *Accord Brotherhood of Railway and Steamship Clerks v. United Air Lines, Inc.*, 325 F.2d 576 (6th Cir. 1963).

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[4] The National Mediation Board (NMB) considers the status of the acquired company's union as the certified bargaining agent to be erased by the merger. Therefore, NMB views actions by the new entity in favor of one union or the other to be voluntary recognition of a union. Although ALEA maintains that it is clearly the majority union (with 6624 members to BRAC and IAM's 6400 members), the numbers are not sufficiently lopsided to give ALEA a clear majority and the merger creates doubts as to the proper representative. *Cf. International Ass'n of Machinists v. Northeast Airlines, Inc.*, 536 F.2d 975, 977 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976).

No. 86-2233

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AIR LINE EMPLOYEES ASSOCIATION, INTERNATIONAL, *Plaintiff,* v. REPUBLIC AIRLINES, INC., et al., *Defendants.*	Case No. 86 C 5239

ORDER

This cause arises out of the impending merger of Republic Airlines with NWA, Inc. Plaintiff represents nearly 7,000 employees of Republic Airlines and claims that, among other things, defendants are violating the Railway Labor Act, 45 U.S.C. § 151 *et seq.* by negotiating the future employment relationship of Republic employees with the unions currently representing Northwest's employees.

Before addressing the plaintiff's claims, the Court must first determine if it has jurisdiction to hear them.

In view of the overwhelming and well-developed case law addressing issues similar to those presented in the instant complaint, the Court must conclude that this is a representational dispute over which the federal courts do not have jurisdiction. *See International Brotherhood of Teamsters* v. *Texas International Airlines*, 717 F.2d 157 (5th Cir. 1983); *Air Line Pilots Association* v. *Texas International Airlines*, 656 F.2d 16 (2d Cir. 1981): *International Association of Machinists* v. *Northeast Airlines, Inc.*, 536 F2d 975 (1st Cir. 1976), *cert. denied*, 429 U.S. 961 (1976); *Brotherhood of Railway & Steamship Clerks* v. *United Airlines, Inc.*, 325 F.2d 576 (6th Cir. 1963), *cert. granted*, 377 U.S. 903 (1964), *cert. dismissed*, 379 U.S. 26 (1964) and authority cited therein.

James F. Holderman

APPENDIX B
(Statutes Involved)

STATUTES INVOLVED

28 U.S.C. § 1331

§ 1331. **Federal question**

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1337(a)

§ 1337. **Commerce and antitrust regulations; amount in controversy, costs**

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: *Provided, however,* That the district courts shall have original jurisdiction of an action brought under section 11707 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

45 U.S.C. § 152, First, Third, Fourth and Ninth

§ 152. **General duties—Duties of carriers and employees to settle disputes**

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

* * * *

Designation of representatives

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

* * * *

Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, that nothing in this chapter shall be construed to

prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * * *

Disputes as to identity of representatives; designation by Mediation Board; secret elections

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thrity days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed

necessary by it to carry out the purposes and provisions of this paragraph.

45 U.S.C. § 153, Second

§ 153. **National Railroad Adjustment Board—Establishment; composition; powers and duties; divisions; hearings and awards; judicial review.**

* * * *

System, group, or regional boards; establishment by voluntary agreement; special adjustment boards; establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases

which may be considered by such board shall be defined in the agreement establishing, it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the empolyees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board

may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

45 U.S.C. § 182

§ 182. **Same; duties, penalties, benefits, and privileges**

The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of sections 151 to 152 and 154 to 163 of this title shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 151 of this title.

45 U.S.C. § 184

§ 184. **System, group, or regional boards of adjustment**

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an

appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181 to 188 of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in sections 151 to 163 and 181 to 188 of this title shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of sections 181 to 188 of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.